UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ROBERT D. W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. 3:22-cv-05767-GJL

ORDER ON PLAINTIFF'S COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13. *See also* Consent to Proceed Before a United States Magistrate Judge, Dkt. 2. This matter has been fully briefed. *See* Dkts. 11–15.

Plaintiff is a 56-year-old man with prior employment as a tire builder and a construction worker. The Administrative Law Judge ("ALJ") found that Plaintiff is not disabled because he has the residual functional capacity ("RFC") to perform light work. In finding Plaintiff not disabled, the ALJ rejected Dr. Lee's medical opinion, but this rejection was not supported by

substantial evidence, therefore, the ALJ erred. The ALJ's error is not harmless because the ALJ's evaluation of the medical opinion evidence and the RFC determination could have well differed had the improperly rejected evidence been credited. Therefore, this matter is remanded for further proceedings.

PROCEDURAL HISTORY

Plaintiff was a recipient of disability insurance benefits ("DIB") from July 2011 to June 2015, pursuant to 42 U.S.C. § 423 (Title II) of the Social Security Act ("the Act"). *See* Administrative Record ("AR") 186. In a June 2015 continuing disability review, the Social Security Administration ("the agency") determined Plaintiff had "medically improved" and thus was no longer disabled. AR 186, 281–83. A hearing was scheduled in April 2017 so Plaintiff could appeal the termination of his benefits. AR 186. The April 2017 hearing was rescheduled to July 2017 because Plaintiff was participating in a rehabilitation program through April 2017. *Id.* Plaintiff failed to appear in the rescheduled July 2017 hearing, prompting the agency to determine Plaintiff was no longer disabled as of July 2017 for lack of cooperation, pursuant to 20 C.F.R. § 404.1594(e)(2). AR 192. Plaintiff requested another hearing in October 2018 to appeal the termination of his benefits, but because he failed to submit his request in a timely manner, the agency dismissed Plaintiff's request. AR 110–14.

In April 2019, Plaintiff applied for supplemental security income ("SSI") benefits, pursuant to 42 U.S.C. § 1382e (Title XVI) of the Act, and reapplied for DIB, alleging in both applications a disability onset date of March 6, 2011. AR 117, 130, 146, 162, 326–39. Both applications were denied initially and upon reconsideration. AR 128, 141, 161, 178. Plaintiff's requested hearing was held before ALJ Allen Erickson on April 13, 2021, where Plaintiff attempted to reopen his previous DIB claim. *See* AR 36–61. The ALJ postponed the hearing and

scheduled a second hearing on July 13, 2021, where Plaintiff amended his alleged onset date of disability for both applications to August 1, 2017. *See* AR 62–109. Plaintiff met the insured status requirements of the Act through June 30, 2022, therefore the relevant period for his DIB application is August 1, 2017 through June 30, 2022. AR 17. On August 12, 2021, the ALJ issued a written decision in which the ALJ concluded Plaintiff was not disabled pursuant to the Act. *See* AR 12–34.

The Appeals Council denied Plaintiff's request for review, making the written decision by the ALJ the final agency decision subject to judicial review. AR 6–11; *see* 20 C.F.R. §§ 404.981, 416.1481. Plaintiff filed a complaint in this Court seeking judicial review of the ALJ's August 2021 written decision in October 2022. *See* Dkt. 1. Defendant filed the sealed administrative record regarding this matter on January 3, 2023. *See* Dkt. 9.

BACKGROUND

Plaintiff was born in 1967 and was 49 years old on the amended alleged date of disability onset of August 1, 2017. *See* AR 26. Plaintiff has at least a high school education and previously worked as a tire builder and a construction worker. AR 26, 73–75. According to the ALJ, Plaintiff has at least the severe impairments of congestive heart failure, major depressive disorder, and panic disorder with agoraphobia. AR 17.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

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DISCUSSION

In Plaintiff's Opening Brief, Plaintiff raises the following issues: (1) whether the ALJ failed to discuss Plaintiff's request to reopen Plaintiff's previous determination of nondisability in 2017, (2) whether the ALJ erred at step three in finding Plaintiff did not meet Listing 4.02, (3) whether the ALJ erred in evaluating medical opinion evidence, (4) whether the ALJ erred in evaluating Plaintiff's subjective symptom testimony, and (5) whether the ALJ failed to develop the record. *See* Dkt. 11.

I. Whether the ALJ Erred by Failing to Discuss Whether to Reopen Plaintiff's Previous Determination to Terminate Plaintiff's Disability Benefits

Plaintiff contends the ALJ erred by failing to consider in his decision whether to reopen Plaintiff's previous DIB claim. Dkt. 11 at 3–6. The Court rejects Plaintiff's argument.

During Plaintiff's first hearing before ALJ Erickson in April 2021, Plaintiff's counsel requested to reopen Plaintiff's previous DIB claim. AR 42. The ALJ appeared to be unfamiliar with Plaintiff's request, and decided to hold another hearing to properly address Plaintiff's argument. *See* AR 46–58. A second hearing with ALJ Erickson was held in July 2021, but Plaintiff's counsel did not repeat his request to reopen Plaintiff's previous claim. *See* AR 68–70. While Plaintiff's counsel acknowledged that Plaintiff's benefits were terminated in 2017, the record does not show that Plaintiff's counsel attempted to request the reopening of Plaintiff's previous claim, like he did in April 2021. *See* AR 42, 68–70. Plaintiff's counsel instead formally requested to amend Plaintiff's alleged onset date of disability to August 2017. *See* AR 68–70. Plaintiff's argument that the ALJ failed to address his request in his decision thus fails, considering that the record does not show that he made such a request.

Plaintiff also suggests the Court should remand because there is ambiguity as to whether Plaintiff's failure to appear in the July 2017 hearing was due to a "good cause." Dkt. 11 at 5–6.

After a claimant has been determined disabled under the Act, the agency can later determine the claimant is no longer disabled based on the claimant's medical improvement or when a claimant does not cooperate with the agency, specifically when the claimant "fail[s], without good cause, to do what [the agency] asks." *See* 20 C.F.R. § 404.1594(e). When there is ambiguity in the record about whether the plaintiff's failure to respond to the agency was due to a good cause, the federal court should not make its own findings. Instead, the reviewing court is required to remand and allow the plaintiff a full opportunity to present the issue to the Social Security Administration. *Dexter v. Colvin,* 731 F.3d 977, 981-982 (9th Cir. 2013). To determine whether a "good cause" exists, the agency considers: (1) what circumstances kept a claimant from missing a deadline; (2) whether the agency's action misled a claimant; (3) whether the claimant did not understand the Act or any of the agency's decisions; and (4) whether the claimant had any "physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented [the claimant] from filing a timely request or from understanding or knowing about the need to file a timely request for review." *See* 20 C.F.R. § 404.911(a).

As discussed, Plaintiff's DIB benefits were terminated in June 2015 after the agency determined Plaintiff had "medically improved." AR 186, 281–83. After Plaintiff appealed the termination, an initial hearing was scheduled for April 25, 2017. AR 186. Plaintiff's former counsel asked to reschedule the hearing because Plaintiff was participating in a rehabilitation program that would conclude on April 27, 2017. *Id*. The record shows that, though the hearing was rescheduled to July 25, 2017 as requested, Plaintiff failed to appear at the hearing. *Id*. The

record further shows Plaintiff's former counsel was present at the July 2017 hearing and that Plaintiff "never responded" to his "efforts to contact him regarding his reason for failing to appear at his hearing." *See id*. The agency, after not having received any explanation or reason to again reschedule Plaintiff's hearing, determined Plaintiff was no longer disabled as of July 2017 for lack of cooperation. AR 186–93; 20 C.F.R. § 404.1594(e)(2). There is nothing else in the record, and Plaintiff has put forth no evidence, that would suggest that he had a "good cause," as defined by the Act, for failing to appear at the July 2017 hearing. Accordingly, the Court will not remand on the grounds that there is ambiguity as to whether Plaintiff had a good cause to appear at that hearing.

Plaintiff also argues he has raised a "colorable due process claim" because he was hospitalized when the hearing was held regarding the termination of his benefits and, that as a result, his benefits were terminated without "having a reasonable opportunity to be heard." Dkt. 11 at 6.

Even if there is sufficient evidence in the record for the Court to determine whether a plaintiff suffered from circumstances that made it difficult for plaintiff to understand or take steps to respond to the situation in which the previously-awarded benefits were suspended, thereby excusing the plaintiff's noncompliance, the Court considers whether there is a colorable due process violation. *Udd v. Massanari,* 245 F.3d 1096, 1101-1102 (9th Cir. 2001). A constitutional claim is "not 'colorable', if it 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous.'" *Hoye v. Sullivan*, 985 F.2d 990, 991–92 (9th Cir. 1992) (citations omitted). The mere assertion of a bare constitutional violation without supporting allegations is not a colorable constitutional claim. *Klemm v. Astrue,* 543 F.3d 1139, 1144 (9th Cir. 2008) (internal quotation marks and citation

omitted). "Rather, the claim must be supported by facts sufficient to state a violation of substantive or procedural due process." *Id*. (internal quotation marks and citation omitted). Here, Plaintiff has failed to provide any such bases for his constitutional claim. Plaintiff's assertion relies on the fact that he was hospitalized at the time of the hearing, but the record makes it clear he was hospitalized at the time of the April 2017 hearing, and this necessitated the rescheduling of the hearing later to July. *See* AR 186. Again, the record shows Plaintiff failed to appear at the July 2017 hearing with no explanation, even though his previous counsel made several attempts to contact him. *See id*. Plaintiff has not put forth any additional facts that would indicate his absence at the hearing was a due process violation, therefore the Court finds Plaintiff has failed to raise a colorable constitutional claim.

II. Whether the ALJ Erred at Step Three

Plaintiff contends the ALJ erred at step three by declining to find that he meets Listing 4.02. Dkt. 11 at 6–9. The Court disagrees.

At step three, the ALJ determines if a claimant's impairment meets or equals an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listing"). *See Tackett v. Apfel*, 180 F.3d 1094, 1099 (9th Cir. 1999). The Listing describes specific impairments of each of the major body systems which are considered "severe enough to prevent a person from doing any gainful activity." *See also Tackett*, 180 F.3d at 1099. The claimant bears the burden of proof regarding whether or not she has an impairment that meets or equals the Listings. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005). The claimant meets this burden by presenting "medical findings equal in severity to *all* the criteria for the one most similar listed impairment." *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990); 20 C.F.R. § 416.926(a)). A claimant cannot rely on overall functional impact but

must demonstrate that the impairment equals each criterion in the Listing. *Id.* The ALJ "is not required to discuss the combined effects of a claimant's impairments or compare them to any listing in an equivalency determination, unless the claimant presents evidence in an effort to establish equivalence." *Burch*, 400 F.3d at 683. If a claimant meets or equals a Listing, the claimant is considered disabled without further inquiry. *See* 20 C.F.R. §§ 404.1520(d), 416.920(d). "A generalized assertion of functional problems," however, "is not enough to establish disability at step three." *See Tackett*, 180 F.3d at 1100.

A claimant's impairments meets or equals Listing 4.02 by showing, in relevant part, the following:

> A. Medically documented presence of one of the following:
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> 1. Systolic failure . . . , with left ventricular end diastolic dimensions greater than 6.0 cm or ejection fraction of 30 percent or less during a period of stability (not during an episode of acute heart failure) . . .
>
> *AND*
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> B. Resulting in one of the following:
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> 1. Persistent symptoms of heart failure which very seriously limit the ability to independently initiate, sustain, or complete activities of daily living in an individual for whom a[] [medical consultant], preferably one experienced in the care of patients with cardiovascular disease, has concluded that the performance of an exercise test would present a significant risk to the individual . . .

20 C.F.R. § Pt. 404, Subpt. P, App. 1 (Listing 4.02) (emphasis added).

Plaintiff argues the first requirement of the Listing is met based on two treatment notes from October 2016 and May 2017, which show his left ventricular ejection fraction was measured at 20-25% during periods of stability. Dkt. 11 at 8 (citing AR 1488, 1613). But there is nothing in the treatment notes, and Plaintiff does not explain, how these results show that they were findings from a period of stability. Further, both treatment notes predate Plaintiff's

amended alleged onset date of August 1, 2017, therefore they, by themselves, would not be probative to the issue of whether Plaintiff met the Listing during the relevant period. *See Carmickle v. Comm'r, Soc. Sec. Admin.,* 533 F.3d 1155, 1165 (9th Cir. 2008) ("Medical opinions that predate the alleged onset of disability are of limited relevance.").

Plaintiff next argues the second requirement of the Listing is met based on his "persistent symptoms," including dizziness, fatigue, and difficulty walking long distances. Dkt. 11 at 8. While Plaintiff himself did testify to such symptoms, Plaintiff does not cite to any evidence to show that a medical consultant has found him to be as limited as he alleges due to his symptoms. But even if Plaintiff was able to, because Plaintiff did not meet the first requirement of the Listing, Plaintiff nonetheless is unable to show that he is disabled pursuant to Listing 4.02.

Plaintiff also argues the ALJ erred by failing to provide a sufficient explanation as to why he did not meet Listing 4.02. Dkt. 11 at 8–9; AR 19. However, throughout the ALJ's entire decision, the ALJ explained how the record shows Plaintiff's heart condition had improved and that the symptoms he was experiencing were due to other possible impairments. *See infra* Section IV. A court errs "by overlooking the ALJ's full explanation." *Kaufmann v. Kijakazi*, 32 F.4th 843, 851 (9th Cir. 2022). Further, the reviewing court is "not deprived of [its] faculties for drawing specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989). Though the ALJ did not cite evidence specifically during his step three discussion, the ALJ's finding that Plaintiff did not meet Listing 4.02 was nonetheless supported by his explanation elsewhere in his decision. The Court, therefore, finds the ALJ did not err at step three.

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III. Whether the ALJ Erred in Evaluating Medical Opinion Evidence

Plaintiff contends the ALJ erred in evaluating the medical opinion of Dr. Lee, and by failing to incorporate the opinions of Dr. Virji, Dr. Alto, Dr. Eisenhauer, and Dr. Anderson into Plaintiff's RFC. Dkt. 11 at 9–13.

A. Dr. Mike Lee

Plaintiff filed both his SSI and DIB applications in April 2019. AR 117, 130, 146, 162, 326–39. For applications filed after March 27, 2017, ALJs must consider every medical opinion in the record and evaluate each opinion's persuasiveness, with the two most important factors being "supportability" and "consistency." *Woods v. Kijakazi*, 32 F.4th 785, 791 (9th Cir. 2022); 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Supportability concerns how a medical source supports a medical opinion with relevant evidence, while consistency concerns how a medical opinion is consistent with other evidence from medical and nonmedical sources. *See id.*; 20 C.F.R. §§ 404.1520c(c)(1), (c)(2); 416.920c(c)(1), (c)(2). Under the new regulations, "an ALJ cannot reject an examining or treating doctor's opinion as unsupported or inconsistent without providing an explanation supported by substantial evidence." *Woods*, 32 F.4th at 792.

In January 2020, Dr. Lee opined that Plaintiff is unable to meet competitive standards for making simple work-related decisions and completing a normal workday and workweek without interruptions from psychologically based symptoms. AR 1829. Dr. Lee further opined Plaintiff would find dealing with the public and supervisors stressful, and that based on Plaintiff's mental health symptoms, Plaintiff would be absent from work four days a month. AR 1831.

The ALJ first discounted Dr. Lee's opinion because it was unsupported by his own examination notes, specifically that Plaintiff presented appropriately groomed and dressed, was friendly and cooperative, and was able to quickly establish rapport. AR 25 (citing AR 1813,

1955). Yet, the ALJ does not explain how Plaintiff's presentations from two appointments with Dr. Lee in 2019 do not support his 2020 opinion about Plaintiff's ability to function in a work setting. Further, the ALJ also seems to side-step Dr. Lee's other findings from the cited treatment notes, which show Plaintiff was found to be anxious. AR 1813, 1955. The ALJ did not rely upon substantial evidence when he concluded that Dr. Lee's opinion is unsupported by his own findings. As such, in discounting his opinion for this reason, the ALJ erred.

The ALJ also discounted Dr. Lee's opinion because it was inconsistent with Plaintiff's mental status examinations throughout the record showing he had adequate attention and memory and was logical and goal directed. AR 25 (citing AR 1811–12, 1924, 1940). But again, Plaintiff's presentations during his appointments do not necessarily negate Dr. Lee's opinion about Plaintiff's ability to function in a work setting. Further, the same treatment notes cited by the ALJ also show Plaintiff wanted to end his appointment early because of his anxiety, and he was observed "to be struggling with anxiety and depressive symptoms which may be longstanding." AR 1812, 1924, 1940. Again, the ALJ's finding that Dr. Lee's opinion was inconsistent with Plaintiff's record is not supported by substantial evidence, therefore, in discounting it for this reason, the ALJ erred.

An error is harmless if it is not prejudicial to the claimant or is "inconsequential" to the ALJ's "ultimate nondisability determination." *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). The determination as to whether an error is harmless requires a "case-specific application of judgment" by the reviewing court, based on an examination of the record made "'without regard to errors' that do not affect the parties' 'substantial rights.'" *Molina*, 674 F.3d at 1118–1119 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting 28 U.S.C. §2111)).

The ALJ's errors in this case were not harmless. Had the ALJ properly evaluated Dr. Lee's opinion, the ALJ may have assessed Plaintiff's RFC differently and, consequently, affected the ALJ's ultimate determination of nondisability. Accordingly, the ALJ's harmful error requires reversal. The Court directs the ALJ to reassess Dr. Lee's opinion on remand.

B. Dr. Alnoor Virji, Merry Alto, M.D., Renee Eisenhauer, Ph.D., and Jon Anderson, Ph.D.

Plaintiff also contends the ALJ erred by failing to include in his RFC the limitations opined by Dr. Vijri, Dr. Alto, Dr. Eisenhauer, and Dr. Anderson because the ALJ found their opinions persuasive. Dkt. 11 at 12–13. The Court has reviewed Plaintiff's argument, but declines to reach them as the Court has already determined that remand is necessary, and Plaintiff's RFC must be reevaluated for the reasons given above. *See* Social Security Ruling 96-8p, (an RFC "must always consider and address medical source opinions"); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009) ("an RFC that fails to take into account a claimant's limitations is defective").

IV. Whether the ALJ Erred in Evaluating Plaintiff's Subjective Symptom Testimony

Plaintiff contends the ALJ erred in evaluating his subjective symptom testimony. Dkt. 11 at 13–15.

When a claimant has medically documented impairments that could reasonably be expected to produce some degree of the symptoms she alleges, and the record contains no affirmative evidence of malingering, "the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering specific, clear and convincing reasons for doing so." *Garrison v. Colvin*, 759 F.3d 995, 1014–15 (9th Cir. 2014) (quoting *Smolen v. Chater*, 80 F.3d

1273, 1281 (9th Cir. 1995)). "The standard isn't whether [the Court] is convinced, but instead whether the ALJ's rationale is clear enough that it has the power to convince." *Smartt v. Kijakazi*, 53 F.4th 489, 499 (9th Cir. 2022).

Plaintiff testified that he feels exhausted, has difficulties waking up and sleeping, is nauseous, and profusely sweats when his heart pressure is low. AR 77. Plaintiff explained he experiences these symptoms two to three days a week. AR 84. Plaintiff testified he cannot walk 100 yards without having to stop, and he can only stay on his feet for 15 minutes every hour. AR 86. He stated he can pick up items weighing up to 20 pounds, and pick up and carry items weighing up to 10 pounds. AR 88. As for his mental health, Plaintiff testified he does not like being around others, and has panic attacks three to four times a month, and each panic attack can last for half an hour. AR 82, 91. Plaintiff also testified he relies on his son and his significant other to manage household chores. AR 80–82.

The ALJ first discounted Plaintiff's testimony regarding his heart condition because there was "little ongoing treatment or objective testing." AR 22. An ALJ may discount the claimant's testimony when the "'level or frequency of treatment is inconsistent with the level of complaints.'" *Molina*, 674 F.3d at 1113 (internal quotations omitted). Here, the ALJ pointed out that in August 2017, Plaintiff's right ventricle was mildly dilated and his left ventricle moderately dilated, but nonetheless improved compared to a January 2017 examination. AR 24 (citing AR 1715). The ALJ noted that Plaintiff was hospitalized in May 2018 for nausea and vomiting and that his cardiac condition was considered as a possible cause. AR 1603. However, the treatment notes stated Plaintiff appeared euvolemic on exam, his vomiting was possibly caused by alcoholic gastritis, and findings from the exam were consistent with compensated

heart failure. AR 1603–04. The ALJ also pointed out similar findings from treatment notes from March 2019. *See* AR 1648.

The ALJ then discounted Plaintiff's testimony regarding his mental health because his recent treatment notes show Plaintiff was "largely stable" or there were "little to no mental health treatment" during the relevant period. AR 22. Evidence that medical treatment helped a claimant "'return to a level of function close to the level of function they had before they developed symptoms or signs of their mental disorders' . . . can undermine a claim of disability." *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th Cir. 2017). The ALJ's assessment of the record is supported by substantial evidence. The records relied on by the ALJ show that though Plaintiff reported symptoms of depression, he also reported improvement in his mood, insomnia, and anxiety due to medication. AR 1600, 1747, 1799, 1899, 1907, 1948. Given Plaintiff's own reports of improvement, the ALJ could reasonably discount Plaintiff's testimony.

Plaintiff argues the ALJ "placed undue weight on the evidence of improvement," but does not direct the Court to any evidence to show the ALJ's findings were not supported by the record. *See* Dkt. 11 at 14. Given the lack of specificity in Plaintiff's argument, Plaintiff has failed to demonstrate any harmful error on this issue. *See Bailey v. Colvin*, 669 Fed. Appx. 839, 840 (9th Cir. 2016) (citing *Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012)) (finding no error where the claimant did not "demonstrate prejudice from any errors"). The Court therefore rejects Plaintiff's conclusory argument.

In sum, the ALJ's rationale in discounting Plaintiff's testimony regarding his heart condition and mental health was clear enough "that it has the power to convince." *Smartt*, 53 F. 4th at 499. Therefore, the Court finds the ALJ did not err in discounting Plaintiff's testimony.

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V. Duty to Develop Record

Plaintiff argues the ALJ's record is inadequate, and the ALJ had a duty to further develop it because "there were no medical opinions in the record that the ALJ found to be entirely persuasive or that adequately addressed Plaintiff's current functioning." Dkt. 11 at 14–15.

The ALJ "has an independent 'duty to fully and fairly develop the record and to assure that the claimant's interests are considered.'" *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (quoting *Brown v. Heckler*, 713 F.2d 411, 443 (9th Cir. 1983) (per curiam))). "The ALJ's duty to supplement a claimant's record is triggered by ambiguous evidence, the ALJ's own finding that the record is inadequate or the ALJ's reliance on an expert's conclusion that the evidence is ambiguous." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (citing *Tonapetyan*, 242 F.3d at 1150). However, the ALJ's duty to develop the record cannot be used to shift the burden of proving disability to the ALJ. *See Mays v. Massanari*, 276 F.3d 453, 460 (9th Cir. 2001) (noting it is the claimant's "duty to prove she was disabled" and she cannot "shift her own burden" to the ALJ by virtue of the ALJ's duty to develop the record). It is the claimant who is "responsible for providing the evidence" for ultimately proving she is disabled. *See Gray v. Comm'r. of Soc. Sec. Admin.*, 365 Fed. Appx. 60, 63 (9th Cir. 2010).

Here, Plaintiff fails to argue with specificity which part of the record is so ambiguous that it would trigger the ALJ's duty to further develop it. Further, the ALJ has neither made a finding that the record is inadequate nor relied on an expert stating the evidence is ambiguous. The Court, therefore, rejects Plaintiff's argument.

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VI. Remand for Further Proceedings

"The decision whether to remand a case for additional evidence, or simply to award benefits[,] is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). If an ALJ makes an error and the record is uncertain and ambiguous, the court should remand to the agency for further proceedings. *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017). Likewise, if the court concludes that additional proceedings can remedy the ALJ's errors, it should remand the case for further consideration. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017).

The Ninth Circuit has developed a three-step analysis for determining when to remand for a direct award of benefits. Such remand is generally proper only where:

> (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand.

Trevizo v. Berryhill, 871 F.3d 664, 682–83 (9th Cir. 2017) (quoting *Garrison*, 759 F.3d at 1017). However, when an ALJ errs, the proper course is to remand for further administrative proceedings "except in rare circumstances." *Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014).

The Court agrees with Plaintiff that a remand for further proceedings is the proper remedy. *See* Dkt. 11 at 12. The Court may remand for further proceedings "'when the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled within the meaning of the Social Security Act.'" *Burrell v. Colvin*, 775 F.3d 1133, 1141 (9th Cir. 2014) (quoting *Garrison*, 759 F.3d at 1021). In this case, outstanding issues remain as to whether the ALJ properly evaluated medical opinion evidence and how this impacts Plaintiff's RFC

determination. As these issues create "serious doubt as to whether the claimant is, in fact, disabled[,]" the Court exercises its discretion to remand this case for further proceedings. *Burrell*, 775 F.3d at 1141.

CONCLUSION

Based on these reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for further consideration consistent with this order.

The Clerk is directed to enter **JUDGMENT** for Plaintiff and close the case.

Dated this 3rd day of May, 2023.

Grady J. Leupold
United States Magistrate Judge